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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN E. OLSON,

Plaintiff and Appellant,

v.

DEPARTMENT OF MOTOR VEHICLES,

Defendant and Respondent.

D052044

(Super. Ct. No. GIC841338)

APPEAL from a judgment of the Superior Court of San Diego County, Rafael A. Arreola, Judge. Affirmed.

I.

INTRODUCTION

Appellant John Olson appeals from a judgment of the trial court denying Olson's petition for a writ of mandate following a decision by respondent Department of Motor Vehicles (DMV) suspending Olson's driving privilege. The DMV found Olson to be a negligent operator after Olson received four speeding tickets, amounting to four points, within a 12-month period. Although the DMV could have suspended Olson's driving

privilege for a year after finding him to be a negligent operator, the DMV instead placed Olson on probation for one year. Approximately four months after he was placed on probation, Olson received another speeding ticket. The DMV thereafter revoked Olson's probation and suspended his driving privilege for the remaining seven months of his probation term.

Olson filed a petition for a writ of mandate in the trial court, challenging the DMV's decision to revoke his probation and suspend his driving privilege. The trial court stayed Olson's suspension during the pendency of the writ petition. Olson received another speeding ticket—his sixth<sup>1</sup>—during an unexplained two-year stay of the suspension imposed by the trial court. When the trial court finally considered Olson's writ petition, the court concluded that the DMV had not abused its discretion in finding Olson to be a negligent operator and in suspending his driving privilege. Despite having previously indicated its intention to apply principles of equity to Olson's case and remand the matter to the DMV for reconsideration of its decision to suspend Olson's driving privilege, the court ultimately declined to do so in view of Olson's sixth speeding violation.

On appeal, Olson contends that "the trial court erroneously refused to grant him equitable relief given the circumstances of this case." Olson argues that because he

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<sup>1</sup> For purposes of the violations at issue in this appeal, this was Olson's sixth speeding ticket. However, the record demonstrates that Olson had committed a number of traffic violations for which he was cited even before the one-year period during which he received the first four speeding tickets that resulted in his being found to be a negligent operator.

ultimately received six speeding tickets over the course of nearly four years, rather than within the two-year time frame set forth in Vehicle Code section 12810.5, subdivision (a), which establishes a presumption of negligent operator status, the court should have granted him equitable relief.<sup>2</sup> We conclude that the trial court did not abuse its discretion in declining to apply equitable principles to Olson's petition for a writ of mandate, and affirm the judgment of the court.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

Olson received four speeding tickets between February and December 2003. Each ticket Olson received counted as one point under the DMV's point system. Pursuant to Vehicle Code section 12810.5, subdivision (a), Olson was presumed to be a "negligent operator of a motor vehicle" as a result of having received four points within a 12-month period.<sup>3</sup>

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<sup>2</sup> Although Olson argues throughout his brief that the trial court erroneously denied him "equitable relief," Olson does not specify what equitable relief he believes he should have been afforded. Based on the record, we assume that Olson is seeking to have his case remanded to the DMV for reconsideration of the suspension in view of the lengthy delay in the proceedings and the fact that his driving record improved during that time.

<sup>3</sup> Vehicle Code section 12810.5, subdivision (a) provides: "Except as otherwise provided in subdivision (b), a person whose driving record shows a violation point count of four or more points in 12 months, six or more points in 24 months, or eight or more points in 36 months shall be prima facie presumed to be a negligent operator of a motor vehicle. In applying this subdivision to a driver, if the person requests and appears at a hearing conducted by the department, the department shall give due consideration to the amount of use or mileage traveled in the operation of a motor vehicle."

The DMV conducted an administrative hearing on the issue of Olson's status as a negligent driver, at which Olson presented evidence of his amount of use and miles traveled. In June 2004, the DMV issued a "Notification of Findings and Decision" in which it determined that Olson was a negligent operator. However, the DMV considered the amount of Olson's use of his vehicle to commute to work to be a factor in mitigation, and placed him on probation for a one-year term rather than suspending his license for a year. Olson's probation term was set to expire on June 11, 2005.

On October 2, 2004, approximately four months into his probation, Olson received a speeding ticket. Because Olson received a speeding ticket while on probation, the DMV held an administrative hearing in December 2004. At the hearing, Olson admitted that he received a ticket for driving 70 miles per hour in a 65-mile-per-hour zone. The DMV again considered evidence of the amount of Olson's use of his vehicle, and miles traveled, and determined that Olson drove 64 miles a day, five days a week, for work. At the conclusion of the hearing, the DMV revoked Olson's probation and reinstated the suspension of his driving privilege for seven months, from January 2, 2005 through July 1, 2005.

Olson filed a petition for a writ of mandamus in the trial court, and sought a stay of the DMV's license suspension. The trial court granted a request for a stay of the suspension on February 9, 2005. The matter was not set for a hearing, and no proceedings were held for over two years. The record does not disclose a reason for the lengthy delay.

On July 18, 2007, the DMV filed an answer to Olson's petition and requested that the court set the matter for hearing. The court heard the matter on September 25, 2007. At that hearing, the trial court initially indicated that it would be willing to rule in Olson's favor, based on what the court believed was a drastic improvement in Olson's driving record during the intervening time period. The trial court stated:

"Since this happened in 2005, and the record reflects that apparently Mr. Olson had a clean record since then – he had an awful record prior to that, like 10 points, violations every couple of months or something, but since 2005, for approximately two years, he seems to have been clean. So if that's the case, here's what I had as a tentative: I was going to remand it so that the hearing officer could hear and consider the current or more recent driving record in making a decision, okay? But my mind can be changed. On that one I'm flexible. Either one can change my mind in one way or the other, okay? . . . ¶ Here's a person – and correct me if I'm wrong. If he's has violations over the last couple of years, then all bets are off, and the petition is denied. But if he has a clean record for two years, for a person who has a violation every two months, and has many of them, that's quite a change. And that's why I was considering having the hearing officer listen to it, consider his current record, and see if there's an alternative resolution to the suspension, okay?"

In response to the trial court's comments, counsel for the DMV pointed out that Olson's post-2004 driving record was not in the court file. The trial court responded, "[S]omehow, going through the file, I got the impression – that's why I said I was going to do what I said I was going to do – that up to today, or since this happened a couple of years ago, that the petitioner hasn't had any violations. . . ."

The following colloquy then occurred between the trial court and Carl Hancock, Olson's attorney:

"Mr. Hancock: Well, if this is dispositive, Your Honor, We'll continue this to get the record. And if he's got a violation, I'll withdraw my petition. If he doesn't, maybe the court will allow it.

"The Court: Let me tell you something: If he has a violation, then all bets are off.

"Mr. Hancock: I won't come back. How's that?"

The court continued the matter for a week to allow the DMV to access Olson's current driving record. That record indicated that Olson received another speeding ticket on January 1, 2007, during the court-ordered stay of his suspension.

Despite his earlier comments, Olson's attorney did not withdraw Olson's mandamus petition. Attorneys for both parties appeared before the court for a hearing on October 2, 2007. At that hearing, Olson's attorney argued that equitable principles still mitigated in favor of remanding the matter to the DMV for reconsideration of Olson's suspension.

The trial court rejected this argument, stating, "First, I'll make some independent findings. In terms of abuse of discretion, on the record that the hearing officer had, there is no abuse of discretion. Four tickets, put on probation, and got a fifth ticket. So there's no problem with that." The court went on to explain:

"Here is what I was trying to do: What I was trying to do is say, 'Well, even though the hearing officer did not abuse his or her discretion, and did not act in excess of jurisdiction, and made a decision based on the evidence presented, does the court have the authority to now order him to reconsider on the basis of [Olson] being clean and clear of any type of violations since the license was

suspended by the D.M.V. or since the finding of the hearing officer?' The court wasn't sure if I could apply equitable principles to that extent to order a hearing on the basis that this person's been clean for two-and-a-half years. But, unfortunately, he was not clean for two-and-a-half years. I was under the impression that he had absolutely no violation of any sort. He did have one violation. So I am not going to attempt to do what I suggested that should be done. So the petition is denied. The stay is lifted."

Olson filed a timely notice of appeal of the court's denial of his petition.

### III.

#### DISCUSSION

Olson argues that "the court refused to apply equity in light of appellant's additional one point violation on January 1, 2007," and that "this ruling is contrary to Vehicle Code section 12810.5, [subdivision] (a)" because "even adding this sixth violation, appellant did not receive the violation points within a 24 month period." According to Olson, "[t]he trial court improperly declined to apply equity in this case by relying on a point count system to deny relief which exceeds that even permitted under an action at law strictly applying the dictates of the controlling statute."

Although Olson relies on the standards of section 12810.5, subdivision (a) in suggesting that the trial court acted inequitably, it is important to note that the trial court was not deciding in the first instance whether Olson was, in fact, a negligent driver under section 12810.5, subdivision (a). The DMV had already made that determination. The trial court was acting on Olson's petition for a writ of mandamus, pursuant to Code of Civil Procedure section 1094.5. The only potential issues before the trial court were thus "whether the [DMV] has proceeded without, or in excess of jurisdiction; whether there

was a fair trial; and whether there was any prejudicial abuse of discretion" (Code of Civ. Proc., § 1094.5, subd. (b)) in the license suspension proceeding, depending on the argument Olson chose to make in his writ petition. The trial court found no error or abuse of discretion in the DMV's decision to suspend Olson's driving privilege, and Olson does not contend that the court erred in concluding that Olson failed to establish that the DMV acted without or in excess of its jurisdiction, that his trial was not fair, or that the DMV abused its discretion in revoking probation and reinstating the license suspension.

Olson nevertheless contends that the trial court should have used its equitable power to order the DMV to reconsider its decision to suspend his license because, by his calculations, he no longer met the standard for being a negligent operator at the time the trial court ruled on his petition. Olson relies on the fact that from February 2003 through January 2007, he received six one-point violations, which would be six points over 46 months. Olson goes on to note that the statute creates a negligent operator presumption only where an individual has received "six or more points in 24 months, or eight or more points in 36 months." (§ 12810.5, subd. (a).)

The statute provides three different violation-to-time-frame ratios, each of which creates a presumption that a driver is a negligent operator: "[A] person whose driving record shows a violation point count of four or more points in 12 months, six or more points in 24 months, or eight or more points in 36 months shall be prima facie presumed to be a negligent operator of a motor vehicle." (§ 12810.5, subd. (a).) Olson received four points within 12 months, and then received an additional two points over the



following three year period. Olson would combine all six violations and apply the time frame over which he incurred the six violations to demonstrate that he does not meet the standard for being deemed a negligent operator. In making this argument, however, Olson ignores the fact that he already met the presumption that he was a negligent operator when he suffered four one-point violations within a 12-month period. He further ignores the fact that the DMV already determined him to be a negligent operator, based on those four violations. Once that occurred, the "counting" of his violations was complete for purposes of the suspension of his license.

Although Olson maintains that the trial court should have considered his subsequent driving record for equitable reasons, it is not clear that the trial court has the authority to consider Olson's driving record for the period of time between the DMV suspension and trial court stay of the suspension and the time of the hearing on his writ petition, or that the trial court may use a more recent driving record as a basis for setting aside the DMV's order and remanding the matter to the DMV for reconsideration.<sup>4</sup> The fact that Olson received a sixth violation prior to the time the trial court ruled on his writ petition did not change the fact that Olson had already met the standard set forth in

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<sup>4</sup> At least one appellate court has determined that in certain, unusual circumstances, a trial court reviewing a DMV administrative proceeding by way of writ petition may consider and rely on evidence that arose after the administrative proceeding, in ordering equitable relief. (See *Curtin v. Department of Motor Vehicles* (1981) 123 Cal.App.3d 481 [trial court could consider DMV's improper suspension of a driver's license from an earlier, separate proceeding, and could use this information in considering the fairness of the length of a second DMV suspension].) However, we are not convinced that a court may consider such evidence in reviewing a DMV ruling under more general circumstances, such as exist here.

Vehicle Code section 12810.5, subdivision (a) for a negligent operator as a result of the four points he received between February and December 2003. Nor does it alter the fact that Olson violated his probation, and was thus eligible to have his license suspended.

The DMV properly determined that Olson was a negligent driver based on his receiving four points within a 12-month period. At that point, the DMV had the authority to suspend his license. (See *Beamon v. Department of Motor Vehicles* (1960) 180 Cal.App.2d 200, 210.) However, after considering the mitigating circumstances of Olson's amount of use of his vehicle and miles traveled, the DMV decided to give him an opportunity to prove himself by placing him on probation, rather than immediately suspending his license.<sup>5</sup> The DMV informed Olson that while on probation he was required to "obey the provisions of the California Vehicle Code, all traffic regulations in [California] and other states, and remain free from accident responsibility . . . ." Olson was further informed that if he were to violate these terms, his license would be suspended or revoked.

Olson failed to meet the conditions of his probation in that he received another speeding ticket during his term of probation. The DMV was authorized to suspend Olson's license as a result of his failure to comply with the conditions of his probation

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<sup>5</sup> Section 14250 of the Vehicle Code provides: "Whenever by any provision of this code the department has discretionary authority to suspend or revoke the privilege of a person to operate a motor vehicle, the department may in lieu of suspension or revocation place the person on probation, the terms of which may include a suspension as a condition of probation, issuing a probationary license with such reasonable terms and conditions as shall be deemed by the department to be appropriate."

under Vehicle Code section 14252. That section provides, "The department upon receiving satisfactory evidence of a violation of any of the terms or conditions of probation imposed under this code, may withdraw the probationary license and order the suspension or revocation of the privilege to operate a motor vehicle." The DMV thus clearly acted within its jurisdiction when it revoked Olson's probation and suspended his license after Olson received a speeding ticket while on probation.

Once the DMV found Olson to be a negligent operator and suspended his license, there was no reason to continue "counting" Olson's later violations. Olson's writ petition led the trial court to review the basis of the DMV's determination. The court was required to consider only the evidence of the violations that formed the basis of the DMV's ruling. The existence of a subsequent violation (or the lack of a subsequent violation) is irrelevant to the question whether the DMV's administrative order was valid at the time it was made, since that question must be answered based on the state of the record that was before the DMV.

Olson contends that the trial court could have properly considered evidence of his subsequent driving record pursuant to Code of Civil Procedure section 1094.5, subdivision (e), which allows a court that is reviewing a petition for a writ of administrative mandamus to admit evidence that was not presented at the administrative hearing, when it is "relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded." Olson argues that his subsequent driving record was relevant and "could not have been produced" at the hearing, since the driving record came into existence only after the hearing took place.

We disagree that Olson's updated driving record was relevant, since the trial court was considering whether the DMV acted appropriately at the time of the initial hearing.

Even assuming that the trial court could properly have considered and relied on Olson's recent driving record as a basis for ordering the DVM to reconsider Olson's case, Olson cannot demonstrate that the trial court abused its discretion in declining to do so. Olson repeatedly demonstrated his inability or unwillingness to comply with the law, despite being on notice that he was at risk of having his driving privilege suspended. Although Olson did manage to reduce the rate at which he received speeding tickets, he was aware that the court could revoke his probation if he were to receive *any* additional tickets. The trial court acted well within its discretion in declining to grant Olson equitable relief under these circumstances.

#### IV.

#### DISPOSITION

The judgment of the trial court is affirmed. Costs are awarded to respondent.

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AARON, J.

WE CONCUR:

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HALLER, Acting P. J.

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O'ROURKE, J.